IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Application No.:	10/757,145	:	Examiner:	CHAPMAN, Jeannette E.
Filed:	January 14, 2004	:	TC/A U:	3625
Applicant:	JOLITZ, Randal J.	:	Confirmation No.:	3169
Docket No.:	55616.107495	:	Customer No.:	27526
Title:	STARTER BLOCK ROOFING PRODUCT			

Via EFS-Web
Commissioner for Patents
P.O. Box 1450
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Sir:

REPLY BRIEF

Appellant submits the following Reply Brief to the Board of Patent Appeals and Interferences under 35 C.F.R. § 41.37. The Notice of Appeal was filed February 9, 2007 and the Examiner's Answer was mailed July 26, 2007.

I. Status of Claims

Claims 1-23 are currently pending with Claims 1 and 12 being independent. Claims 1-23 are the subject of this appeal and stand rejected under 35 U.S.C. § 103(a).

II. Grounds of Rejection to be Reviewed on Appeal

Appellant respectfully submits that the Examiner has not met her burden in establishing a prima facie case of obviousness in the following rejections:

A. Claims 1-4 and 8-13 were rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 3,852,934 to Kirkhuff in view of U.S. Patent No. 4,279,106 to Gleason et al.

B. Claim 5 was rejected under 35 U.S.C. § 103(a) as being unpatentable over Kirkhuff in view of Gleason et al. as applied to Claim 1 and further in view of U.S. Patent No. 5,953,862 to Earhardt.

C. Claims 6-7 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Kirkhuff in view of Gleason as applied to Claim 1 and further in view of U.S. Patent No. 2,142,996 to Bussey.

D. Claims 12-15 and 19-23 were rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 2,193,233 to Hardy in view of Kirkhuff in view of Gleason and further in view of U.S. Patent No. 6,199,338 to Hudson, Jr. et al..

E. Claim 16 was rejected under 35 U.S.C. § 103(a) as being unpatentable over Hardy in view of Kirkhuff in view of Gleason further in view of Hudson, Jr. as applied to Claim 12 and further in view of Earhardt.

F. Claims 17-18 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Hardy in view of Kirkhuff in view of Gleason further in view of Hudson, Jr. as applied to Claim 12 and further in view of Bussey.

III. Argument

A. Examiner's Answer

In response to the Examiner's Answer and based on the record of this application including Appellants' Appeal Brief which is hereby incorporated by reference, Appellant respectfully submits that the Examiner's rejections are in error and must be reversed.

In summary, the Examiner is in error on the following issues:

1. Contrary to the Examiner's assertions, Applicant's claims do recite structure distinguishing and linking the long-felt but unsolved needs addressed by the present invention.

2. The Examiner's proposed combinations of prior art are improper and fail to meet all of the claim limitations.

3. The Examiner's proposed combinations of the Earhardt reference does not support the obviousness rejections and Earhardt is not analogous art.

B. Contrary to the Examiner's assertions, Appellant's claims do recite structure distinguishing and linking the long-felt but unsolved needs addressed by the present invention.

(1) The need for a starter block that prevents the first course of starter shingles from substantially bending

Appellant has argued that the present invention addresses one of the long-felt but unsolved needs of the prior art, namely, the present invention is directed to the particular problem of providing a starter block that substantially eliminates any gaps between the front portion of the first course of starter shingles and the upper or top surface of the product underlying the first course shingle and/or any gap between the back of the first course shingle and the roof so that the first course shingles may be installed without

substantially bending or breaking. However, the Examiner asserts that Appellant "does not include the above language in the claims; thus, applicant is arguing more limiting [sic] than what is claimed. Further, the claims do not recite any structure distinguishing and linking this need to the recited claim language." Moreover, the Examiner also states that Appellant does not claim a starter block that prevents "the first course of starter shingles from substantially bending." Applicant respectfully traverses these assertions.

Appellant's independent Claim 1 clearly recites a composite starter block "for facilitating the subsequent positioning of shingles upon a hip roof" and further that "a shingle placed flat on said top surface [of the starter block] will extend back to said roof without substantially bending." Furthermore, independent Claim 12 specifically recites "at least one course of shingles coupled to said roof, the first course of shingles positioned to lie flat on and at least partially overlap said course of starter blocks with said shingles extending back to said roof without substantially bending." Appellant's claims do therefore clearly meet the Examiner's requirement for structure including a starter block that "prevent[s] the first course of starter shingles from substantially bending." Moreover, this structural limitation is linked to the long-felt but unsolved need for a starter block that prevents the first course of starter shingles from substantially bending. Accordingly, Appellant respectfully submits that independent Claims 1 and 12 and the claims depending therefrom do recite structure linked to the unsolved need in the art and even do so using the Examiner's own language.

(2) The Kirkhuff Reference.

In the Appeal Brief, Appellant presented arguments directed to the fact that the obviousness rejection over the Kirkhuff reference was not supported because Kirkhuff

contains no implicit or explicit teaching that is actually relevant to the claimed invention. Appellant argued that the Kirkhuff reference's starter strip is "specifically designed to be used with the Kirkhuff simulated shingles of a special design and configuration" and that "the Kirkhuff patent is therefore nothing more than a part of the background of the unsolved need for Appellant's invention" because it does "not teach or suggest a starter block that is usable with different types of shingles so as to prevent the first course of shingles from substantially bending." In the Examiner's Answer, the Examiner completely misinterprets this argument. Appellant's argument was directed to the fact that the Examiner's combination uses Kirkhuff in a way that it was not intended or designed to be used and would change the principle of operation of Kirkhuff not as further argument that Applicant's invention meets an unsolved need in the art. This argument is discussed further hereinbelow. Nevertheless, Appellant also submits that, as discussed above, the claims do recite structure that prevents the first course of starter shingles from substantially bending. Accordingly, Appellant again respectfully submits that independent Claims 1 and 12 and the claims depending therefrom do recite structure linked to the unsolved need in the art and even do so using the Examiner's own language.

C. The Examiner's proposed combinations of prior art are improper and fail to meet all of the claim limitations.

(1) Kirkhuff in view of Gleason.

a. Improper Combination

The primary reference to Kirkhuff is directed to an interlocking simulated shingle arrangement providing interlocking interconnections between the simulated shingles in one course with simulated shingles in adjacent courses and interlocking sealing

interconnection between adjacent shingles in the same course. Kirkhuff uses an eaves starter strip that generally simulates the rear portion of the simulated shingle and has a body member that is provided with a top plate substantially identical to the shingle top plate and a bottom plate having a rear edge that is spaced from the rear edge of the body member a preselected longitudinal distance. The Kirkhuff starter strip is therefore specifically designed to be used with the Kirkhuff simulated shingles of a special design and configuration.

The secondary reference to Gleason is directed to a roofing panel that includes an upper, relatively straight-line edge, two side edges at substantially 90 degrees to the upper edge, and a lower, irregular edge having the appearance of a plurality of individual roofing shakes. The upper edge is canted upwardly for receipt within a groove in the underside of an upper overlapping panel. The undersurface of each panel includes a stepped arrangement, not unlike that encountered in a roof constructed of individual shakes, which arrangement enables a pair of such panels to be fitted together with the top surface of panel contacting the lower surface of another panel and forming a substantially parallel surface package for storage and shipment.

Appellant specifically claims that its starter block's two side surfaces are tapered so that a shingle placed flat on the top surface will extend back to the roof without substantially bending. In the Examiner's Answer, the Examiner defends the combination of Kirkhuff and Gleason by stating that "Gleason is merely cited to show the tapered side edges to enable a better fit between mating parts while enhancing water drain off." Further, the Examiner asserts that "[o]ne of ordinary skill in the art would have appreciated that the starter block of Kirkhuff mates with the first shingle and if the edges

of the starter block of Kirkhuff were tapered so would the mating edges of the bottom surface of the starter shingle."

Applicant respectfully submits, however, that the Examiner's proposed combination of Gleason's alleged tapered side edges with Kirkhuff's starter block would destroy the Kirkhuff reference because Gleason's tapered side edges would render Kirkhuff's starter strip inoperable for its intended purpose. See Ex Parte Hartmann, 186 USPQ 366 (POBA 1974). The Examiner's proposed combination also uses Kirkhuff in a way it was not intended or designed to be used. See In re Gordon, 733 F.2d 900 (Fed. Cir. 1984). Moreover, the Examiner's proposed combination requires a substantial reconstruction and redesign of the elements of Kirkhuff and completely changes Kirkhuff's principles of operation. See In re Ratti, 270 F.2d 810 (CCPA 1959). In fact, rather than teaching or suggesting the claimed invention, the Examiner's proposed combination and use of Kirkhuff teaches away from the present invention. U.S. v. Adams, 383 U.S. 39 (1966).

First, if Kirkhuff's side edges were tapered as allegedly taught by Gleason or as disclosed by Appellant, the rear surface 80 of the body member of the eaves starter strip 70 would not be capable of abutting against the base portion 34 of Kirkhuff's shingle. Instead, a substantial gap between the top plate of the starter strip body member and the bottom surface of the forward portion of the shingle. Furthermore, the sealing interconnectivity provided by grooves 86 would be substantially diminished because of the lack of structural integrity created by the gap between the starter strip body member and the shingle. The Examiner's modified configuration would therefore destroy Kirkhuff's principle of operation and stated purpose of providing interlocking sealing

interconnection between adjacent shingles in the same course to provide improved thermal insulation, effective structural integrity and reduced environmental deterioration.

Moreover, this modified configuration does not allow a shingle placed flat on the top surface to extend back to the roof without substantially bending. Applicant's tapered side edges permit a shingle having a planar or flat bottom surface to lie flat on the planar top surface of Appellant's starter block. If the Kirkhuff starter strip possessed tapered side edges, Kirkhuff's shingle would not lie flat on the top surface of the starter strip due to the abutting front edge 34 of Kirkhuff's shingle. If the shingle does not lie flat against the top surface of the starter block, it will bend. Therefore, the Examiner's proposed modification of Kirkhuff's starter strip, even if such a modification were operable, would still not meet the terms of Appellant's claimed invention.

Additionally, Kirkhuff discloses a dependent starter system. That is, Kirkhuff requires a specific starter/shingle alignment due to the interlocking nature of the starter strip and shingle. As a result, Kirkhuff's starter strip cannot be used with any shingle system but can only be used with Kirkhuff's shingle. Adding tapered edges to Kirkhuff's starter strip would destroy the interlocking nature of the starter strip and shingle and would render it inoperable for use with Kirkhuff's shingles. Since the proposed modification of Kirkhuff would render Kirkhuff's starter strip unsatisfactory, no suggestion or motivation to make the proposed modification exists. In re Gordon, 221 USPQ 1125 (Fed. Cir. 1984).

b. Element-by-Element Analysis

Furthermore, Appellant respectfully submits that the combination of Kirkhuff and Gleason still "falls short" in that the combination still does not teach or suggest each and

every element of the claimed invention. In particular, both Kirkhuff and Gleason fail to teach or suggest at least the following elements of Appellant's claimed invention: (1) a composite starter block having a unitary construction; and (2) tapered side surfaces such that a shingle placed flat on the top surface of the starter block will extend back to the roof without substantially bending.

In the rejections as well as the Examiner's Answer, the Examiner states that "Kirkhuff discloses a starter block for facilitating the subsequent positioning of shingles upon a hip roof, the starter block 72 comprising: . . . ." However, Appellant's Claim 1 and Claim 12 each recite that the starter block has a unitary construction. Both the non-final and the final Office Action fail to even mention much less discuss this feature of Appellant's invention. The Examiner's Answer is the first time that the Examiner has asserted that "[b]lock 72 in figure 3 is shown to be of unitary construction." The Examiner provides no other support in the specification for the apparent assertion that Kirkhuff teaches a starter block having unitary construction. However, the Examiner has again mischaracterized Kirkhuff. Rather than a composite starter block having a unitary construction, Kirkhuff teaches a separate starter strip 70 and a separate body member 72 having a separate top plate 74 and a separate bottom plate 76. These separate components are then assembled together to form Kirkhuff's eaves starter strip. Thus, Kirkhuff fails to teach or suggest a composite starter block having a unitary construction.

The secondary reference to Gleason also fails to teach or suggest a composite starter block having unitary construction. In fact, Gleason does not teach or suggest starter blocks at all. Rather, Gleason only briefly mentions that "[p]reliminary to applying panels to a roof, a metal starter strip (not shown) is nailed to the roof and

extends closely adjacent and parallel to the eave." Furthermore, the Examiner makes no claim that Gleason does teach or suggest a composite starter block having a unitary construction. Thus, the Examiner is unable to provide any support or justification whatsoever for how or why the Kirkhuff and/or Gleason teach or suggest a composite starter block having a unitary construction other than the single inaccurate reference to block 72 in figure 3 of Kirkhuff wherein a thorough reading of the specification clearly demonstrates that block 72 does not have a unitary construction at all.

With respect to the second undisclosed feature of the claimed invention, Appellant respectfully submits that the proposed combination of Kirkhuff and Gleason also fails to teach or suggest a starter block having tapered side surfaces wherein a shingle placed flat on the top surface of the starter block will extend back to the roof without substantially bending. In the previous Office Actions, the Examiner clearly admitted that Kirkhuff fails to teach or suggest tapered side edges. However, in the Examiner's Answer and for the first time, the Examiner argues that "the starter shingle of Kirkhuff has two side surface [sic] that are tapered and when the shingle is placed on the top surface it extends back without bending." Further, the Examiner asserts that "Kirkhuff's side surfaces are tapered from the front surface to the back surface but not in the way applicant intends for the taper to be structured." In explanation, the Examiner asserts that Kirkhuff's alleged tapered "enable the bottom surface of the installed shingle 14 to lie flat on the top surface of the starter block 72." However, the Examiner has again mischaracterized the Kirkhuff reference.

Kirkhuff teaches a starter strip 70 that generally simulates the rear portion 38 of the simulated shingle 10 and has a body member 72 that is provided with a top plate 74

and a bottom plate 76 having a rear edge 78 that is spaced from the rear edge 80 of the body member 72 a preselected longitudinal distance. As shown most clearly in Fig. 4, Kirkhuff's body member 72 extends from forward face 82 to the rear edge 80 wherein rear edge 80, rather than tapering to permit shingle body 14 to "be placed flat on said top surface" as claimed by Appellant, instead "abuts against the base portion 34" of the "stepped" shingle body member 14. *See* Col. 9, lines 6-13. The forward face 82 is provided with a wall 84 that defines a plurality of grooves 86 extending transversely from bottom to top to provide interconnectivity with subsequent shingle courses.

Turning to Appellant's Figures 1-5 and paragraph [0024], "the height H_F of the front surface 40 [of starter block 10] is greater than the height H_B of back surface 50. Accordingly, the heights of side surfaces 60 and 70 decrease or taper from the front of starter block 10 to the back." As shown most clearly in Figs. 3 and 5, Appellant's side surfaces substantially decrease in height from front to back and the tapering goes far enough back so as to provide a flat or planar surface for a subsequent course of shingles. Referring specifically to paragraph [0030], the tapered side surfaces of Appellant's starter block enable the bottom surface of an installed shingle 210 to lie flat on the top surface 20 of the starter block 10 "with its front surface 250 in a planar relationship with the front surface 40 of starter block 10." Thus, as can be seen in Fig. 5, the shape and size of starter block 10 and, in particular, the tapered side surfaces of starter block 10 cause the back edge 260 of shingle 210 to be in contact with the roof 150 when shingle 210 is installed overlying starter block 10. Notably, the back edge 260 of shingle 210 is in contact with roof 150 even though shingle 210 is lying flat along the length of the top surface 20 of the starter block 10. The term "flat" as defined in Appellant's specification,

claims, and in Webster's Ninth New Collegiate Dictionary cannot be interpreted to mean a surface that is "stepped." For example, Webster's states that the word "flat," when used as an adjective or adverb, means "lying at full length . . .; having a relative smooth or even surface; arranged or laid out to be level or even. With this configuration, shingle 210 is not bent, flexed, curved or bowed as it extends back beyond starter block 10. Nor can it require a "stepped" lower surface as it must be "flat". Thus, it is the tapered side surfaces of starter block 10 that allows shingle 210 to be installed so that it remains planar or flat between its back edge 260 which is contact with roof 150 and its front edge 250. Accordingly, it is clear that Kirkhuff fails to teach or suggest Applicant's claimed starter block having tapered side surfaces such that a shingle placed flat on the top surface of the starter block will extend back to the roof without substantially bending.

In addition to the new assertions that Kirkhuff discloses tapered side surfaces such that a shingle placed flat on the top surface of the starter block will extend back to the roof without substantially bending, the Examiner's Answer also states that "Gleason is merely cited to show the tapered side edges to enable a better fit between mating parts while enhancing water drain off." In addition to the previously-submitted arguments against the Gleason reference, Appellant respectfully submits that enhancing the mating ability between Kirkhuff's starter block and shingles is not the same as teaching tapered side surfaces such that a shingle placed flat on the top surface of the starter block will extend back to the roof without substantially bending. In fact, this assertion by the Examiner is further evidence that the Kirkhuff starter strip is specifically designed to be used with the Kirkhuff simulated shingles of a special design and configuration and the

combination with Gleason would still not teach or suggest Appellant's invention as claimed.

As previously discussed, moreover, there is no teaching or suggestion in Gleason to provide a starter block at all. Gleason only teaches shingles. The sole teaching by Gleason is for a metal starter strip. Moreover, Appellant respectfully submits that Gleason does not, in fact, teach tapered side edges at all. Element 14 in figure 3 does not designate a tapered side edge of the shingle as asserted by the Examiner, but rather designates the lower edge 14 of roofing panel 10. *See* Col. 2, lines 10-16. Rather, Gleason teaches a roofing "panel that includes an upper, relatively straight-line edge, two side edges at substantially 90 degrees to the upper edge, and a lower, irregular edge having the appearance of a plurality of individual roofing shakes." Col. 1, lines 29-35. Moreover, "[t]he undersurface of each panel includes a *stepped* arrangement . . . ." (*emphasis added*) Col. 1, lines 45-46. The Examiner does not address this argument in the Examiner's Answer at all.

(2) The Bussey Reference

It was asserted in the Office Actions that "Bussey discloses nibs 24/25/26 extending from the side surface of his roofing shingle 27. It would have been obvious to one of ordinary skill in tehart [sic] to include these nibs on the starter bloc/shingle [sic] of Kirkhuff to provide an aligning means upon installation of the starter block/shingles on the roof." In response thereto, Appellant argued that Bussey merely teaches metallic shingles that are symmetrical, reversible and interlockable. Contrary to the Office Action's assertions, the "nib" taught by Bussey is not a spacer. Rather, it is an integral part of Bussey's interlocking system. In the present invention, the claimed nib or spacer

tab ensures consistent spacing. The Examiner's Answer responded with the new assertion that "the fasteners of Bussey perform both functions as shown in the drawings. Edges 23 and 24 are spaced as disclosed in page 2, column 2, lines 25-31." However, the Examiner has again mischaracterized the disclosure of the reference. A careful reading of Bussey, page 2, column 2, lines 25-44 reveals that the edges 23 and 24 are only spaced during construction so as to leave space in the cut out zone for the formation of a semi-circular lock lug 25 which serves to interlock individual shingles together.

(3) The Hardy Reference

The Examiner's Answer asserts that "Hardy shows the tapered side edges as claimed; however, as stated similarly above, Gleason shows the taper as applicant intended. The intended taper is to provide a good fit between building parts as well as providing for water drain off. The taper as shown by Gleason would not destroy the teaching of Hardy but rather enhance the fit of the building elements which engage each other. The bottom of each shingle shows a taper which would facilitate the step taper of Hardy. The stepped arrangement is also a tapered stepped arrangement."

First, Appellant traverses the apparent assertion that a stepped arrangement is also tapered. Moreover, the asserted combination would render Hardy's starter strip unsatisfactory for its intended purpose. Hardy discloses a dependent starter system. That is, Hardy requires a specific starter/shingle alignment due to the interlocking nature of the starter strip and shingle. As a result, Hardy's starter strip cannot be used with any shingle system but can only be used with Hardy's shingle. Adding tapered edges to Hardy's starter strip would destroy the anchoring nature of the starter strip and shingle and would render it inoperable for use with Hardy's shingles because Hardy's shingles are formed

from poured concrete. Furthermore, the proposed modification to Hardy's starter strip would, even if operable, still not allow a shingle to lie flat on the starter strip and extend back to the roof without substantially bending. Since the proposed modification of Hardy would render Hardy's starter strip unsatisfactory, no suggestion or motivation to make the proposed modification exists. In re Gordon, 221 USPQ 1125 (Fed. Cir. 1984).

Moreover, it is asserted in the Examiner's Answer (for the first time) that Hardy does show a unitary piece of material. While it is unclear, the Examiner appears to be stating that element 11 is not composed of more than one piece. Rather, other elements are placed on top of the starter block but they are additional materials not the starter block itself. However, element 11 is a starting (or first course) shingle strip and not a starting block. Rather than a composite starter block having a unitary construction, Hardy teaches that "[f]or the starting strip, a board 50 may be secured to the underside of the sheathing 10, this board extending beyond the edge of the sheathing and built up as by members 52, 52, the latter conforming in thickness to the thickness of the butt edge of the shingle." Further, Hardy teaches that the eaves starter strip is virtually identical to the rear portion of the course of shingles and is provided with a top plate and, if desired, the rear-most portion of the bottom plate. These separate components are then assembled together to form Hardy's eaves starter strip. Thus, Hardy fails to teach or suggest a composite starter block having a unitary construction.

D. The Examiner's proposed combinations of the Earhardt reference does not support the obviousness rejections and Earhardt is not analogous art.

In the Appeal Brief, Appellant argued that the Earhardt reference is not analogous art and is therefore not properly combinable with the other prior art references to support

an obviousness rejection. In the Examiner's Answer, the Examiner states that "nailing zones are not limited to the roofing or shingle industry. They act as guides and a means for securing a structural element to a substrate." Moreover, the Examiner asserts that "Appellant is arguing intended use." Applicant respectfully traverses this assertion because the Examiner's proposed combination of Earhardt's nailing zone with the other prior art references would destroy the Earhardt reference because Earhardt's nailing divot is not for ensuring proper nail placement but rather for weakening the fastening strength of the nail by causing the shim to split in the indented area. See Ex Parte Hartmann, 186 USPQ 366 (POBA 1974). The Examiner's proposed combination also uses Earhardt in a way it was not intended or designed to be used. See In re Gordon, 733 F.2d 900 (Fed. Cir. 1984). Moreover, the Examiner's proposed combination requires a substantial reconstruction and redesign of the elements of Earhardt and completely changes Earhardt's principles of operation. See In re Ratti, 270 F.2d 810 (CCPA 1959

Furthermore, Earhardt is not analogous art. In order to rely on a reference as a basis for rejection of an applicant's invention, the reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the invention was concerned. In re Oetiker, 24 USPQ2d 1443 (Fed. Cir. 1992). The Examiner's Answer asserts that, because nailing zones are not limited to the roofing or shingle industry but are common in the building industry, Earhardt is analogous art and properly combinable. However, if the use of Earhardt's shims including the asserted nailing zones as proposed by the Examiner would destroy the intended purpose of the shims, it is not reasonable to believe that the reference would

logically have commended itself to the inventor's attention in considering the problem at hand in the present invention.

E. MPEP § 707.07(f)

Finally, Appellant respectfully submits that it has not been given the benefit of a full and complete examination. In particular, the Examiner has repeatedly failed to address or respond to the arguments the Appellant presented in its Amendments responsive to both Office Actions. Moreover, the Examiner has added new arguments in the Examiner's Answer. According to MPEP § 707.07(f), "[w]here the applicant traverses any rejection, the examiner should, if he or she repeats the rejection, take note of the applicant's argument and answer the substance of it." The Examiner has not done so here.

IV. Conclusion

For the foregoing reasons, it is respectfully submitted that the pending claims patentably distinguish over the applied prior art and should be deemed to be allowable. Appellant thus courteously requests that the rejection of claims 1-23 as unpatentable over the prior art be reversed. Should any fees be necessitated by this response, the Commissioner is hereby authorized to deduct such fees from Deposit Account No. 11-0160.

Respectfully submitted,

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